

7 Attorneys for Plaintiff and the Proposed Class
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LEWIS

Case No. **11**
Class Action

Mass Action

COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

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CLASS ACTION COMPLAINT

INTRODUCTION

1. Ed Koeller ("Plaintiff") brings this complaint against Textmarks, Inc., Heartland Automotive Services Inc., and Jiffy Lube International, Inc. ("Defendants") for damages, injunctive relief, and any other legal or equitable remedies from the illegal actions of Defendants sending unsolicited text messages to plaintiff's cellular phone in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227, *et seq.*

2. Plaintiff, for his class action complaint, alleges as follows upon personal knowledge as to himself and his own experience, and as to all other matters, upon information and belief, including investigation conducted by his attorneys.

JURISDICTION AND VENUE

3. The court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332(d) because (a) Plaintiff seeks relief on behalf of a national class action, which will result in at least one class member belonging to a different state than that of Defendants and (b) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs since Plaintiff seeks up to \$1,500 in damages for each violation of the TCPA which when aggregated among the proposed class of ten of thousands exceeds the \$5,000,000 threshold for federal court jurisdiction, and (c) none of the exceptions under that subsection apply to this action. All the items of the Class Action Fairness Act of 2005 ("CAFA") are present and this Court has jurisdiction.

4. The Court has personal jurisdiction over the Defendants because under Cal. Code Civ. Proc §410.10 certain of the acts alleged herein were committed in California and specifically the Northern District of California.

5. Venue is proper in the United States District Court for the Northern District of California pursuant to U.S.C. §1391(b) and 1441(a) because the text message calls at issue were transmitted nationwide from within this District. TextMarks Inc., the company that disseminated the text messages, is located in this District. Furthermore, Jiffy Lube International, Inc. does business within the State of California and within this judicial district. In addition, Heartland Automotive Services has multiple service centers throughout the State

1 and regularly conducts business in this District.

2 6. The acts in controversy to this claim originated in the County of San Francisco.
3 Under local rule 3-2(c), this civil action should be assigned to the San Francisco division of the
4 Northern District of California.

5 **PARTIES**

6 7. Plaintiff is, and all times mentioned herein was, an individual citizen and resident
7 of the State of Missouri. Plaintiff is, and all times mentioned herein was a, "person(s)" as
8 defined by 47 U.S.C. §153(10).

9 8. Defendant TextMarks Inc. ("TextMarks") is a California corporation that
10 maintains its principal place of business at 2235 Octavia Street, San Francisco, California
11 94109. It does business throughout the United States, including within this District.

12 9. Jiffy Lube International ("Jiffy Lube") is a Delaware Corporation that maintains
13 its principal place of business at 700 Milam, Houston, Texas 77002. It does business
14 throughout the United States, including in California and within this District.

15 10. Defendant Heartland Automotive Service ("Heartland") is a Minnesota
16 corporation with its principal place of business at 105 Decker Court, Irving, TX 75062
17 and promotes itself as "America's Largest Jiffy Lube Franchisee." Heartland owns and
18 operates service centers throughout the country, including in California and Missouri.

19 **COMMON ALLEGATIONS OF FACT**

20 11. Companies and marketers who have been stifled by federal laws that limit
21 solicitation by telephone, facsimile machine, and e-mail have looked to alternative technologies
22 to accomplish bulk solicitations cheaply and effectively.

23 12. A recent trend in sending cheap unsolicited messages is to advertise through Short
24 Message Service ("SMS") which is a messaging system that allows cellular telephone
25 subscribers to use their cellular telephone to send and receive short text messages, usually
26 limited to 160 characters.

27 13. A "SMS message" is a text message call directed to a cellular telephone through
28 the use of the user's phone number. When the SMS message is sent it rings on the recipient's

1 cellular telephone alerting him that an SMS has been received. Since most people carry their
2 cellular telephone with them everywhere, this type of communication is very effective.

3 14. Unlike email spam, wireless SMS/text message spam costs the recipient money
4 because often cell phone users pay their wireless service provider either for each text message
5 sent or received or for a text-message plan that limits the users to a preset number of text
6 messages, and any amount above that the user will be charged at a higher rate per text message.
7 The text messages are charged to the recipient regardless of whether or not the recipient
8 authorized to receive the text message. Accordingly, SMS/text-message spam is much more
9 harmful than email spam because the sender and/or spammer can actually obligate the recipient
10 to pay for text messages they never wanted or authorized.

11 15. Beginning in 2011, Defendants and their agents directed the mass transmission of
12 wireless spam to cell phones nationwide, hoping that these unsolicited text messages would
13 result in customers to Defendants Heartland and Jiffy Lube's "eClub" and "Signature Oil
14 Change" services.

15 16. On April 22, 2011 Plaintiff received an unsolicited text message advertisement
16 from Defendant sent to Plaintiff's cellular telephone number.

17 17. The telephone identification number provided in the text message read "Text from
18 723-45" The text message stated:

19 **Jiffy Lube customers 1-time offer: Rply Y to join our eClub for 45% off a Signature**
20 **Service Oil Change!**

21 **STOP to unsub**

22 **Msg&data rates may apply**

23 **T&C: jiffyos.com**

24 18. Defendant contacted Plaintiff on Plaintiff's cellular telephone via an "automatic
25 telephone dialing system," as defined by 47 U.S.C. §227(a)(1).

26 19. TextMarks transmitted the above text message to Plaintiff at the direction of
27 Defendants Jiffy Lube and Heartland. TextMarks has also sent mass text messages on behalf of
28 Jiffy Lube to other class members during that same period. In a posting on its support page, the

1 company admits that "we sent an invitation to all existing Jiffy Lube customers" on or before
2 April 21, 2011.

3 20. Defendants' use of an SMS text message enabled Defendants' mass transmission
4 of wireless spam to a list of cellular telephone numbers.

5 21. By sending this unsolicited text message, Defendants used an "automatic dialing
6 system" to make "any call" to "any telephone number assigned to a ... cellular telephone
7 service" as provided in 47 U.S.C. §227(b)(1)(A)(iii).

8 22. The telephone number Defendants called and/or sent the unsolicited text message
9 was assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming
10 calls pursuant to 47 U.S.C. §227(b)(1).

11 23. These telephone calls and/or unsolicited text messages constituted a call that was
12 not for emergency purposes as defined by 47 U.S.C. §227(b)(1)(a)(i).

13 24. Plaintiff did not provide prior conspicuous and express consent to receive calls
14 and/or unsolicited text messages on Plaintiff's cellular telephone, pursuant to 47 U.S.C.
15 §227(b)(1)(A).

16 25. The text messages by Defendants violated 47 U.S.C. §227(b)(1).

17 CLASS ACTION ALLEGATIONS

18 26. Plaintiff brings this suit as a class action on behalf of himself and on behalf of
19 others similarly situated pursuant to Fed. R. Civ. P. 23(a), 23(b)(2), and/or 23(b)(3).

20 27. Subject to additional information obtained through further investigation and/or
21 discovery, the foregoing definition of the Class may be expanded or narrowed. The proposed
22 Class consists of:

23 *All persons in the United States and its Territories who received one or more*
24 *unauthorized text message advertisement by or on behalf of Defendants.*

25 28. This action has been brought and may properly be maintained as a class action
26 pursuant to Fed. R. Civ. Pro. 23 and case law thereunder.

27 29. Numerosity: Upon information and belief, there are hundreds, if not thousands, of
28 members of the Class such that joinder of all members is impracticable.

1 30. **Commonality:** Common questions of law and fact exist as to all members of the
 2 Class. These common questions predominate over the questions affecting only individual Class
 3 members. These common legal and factual questions include, but are not limited to, the
 4 following:

- 5 a. Were Defendants responsible for the dissemination of the text messages described
- 6 herein?
- 7 b. Did Defendants employ an automatic telephone dialing system to disseminate the
- 8 text messages described herein?
- 9 c. Did the text messages described herein qualify as “for emergency purposes” under
- 10 47 U.S.C. §227?
- 11 d. Did Defendants have a policy of obtaining consent to send text messages from its
- 12 customers?
- 13 e. Did the consent form obtained, if any, qualify as “express consent” under 47
- 14 U.S.C. §227?
- 15 f. Does Defendants’ distribution of the text messages described herein violate 47
- 16 U.S.C. §227?
- 17 g. Are the Class members entitled to treble damages based on the willfulness of
- 18 Defendants’ conduct?

19 These and other questions of law or fact which are common to the members of the Class
 20 predominate over any questions affecting only individual members of the Class.

21 31. **Typicality:** Plaintiff’s claims are typical of the claims of the members of the Class
 22 as all members of the Class are similarly affected by Defendants’ wrongful conduct. Plaintiff,
 23 like other members of the Class, received an unsolicited spam text message from Defendants.
 24 Plaintiff is advancing the same claims and legal theories on behalf of himself and all absent
 25 members of the Class.

26 32. **Adequacy:** Plaintiff’s claims are made in a representative capacity on behalf of
 27 the other members of the Class. Plaintiff has no interests antagonistic to the interests of the
 28 other members of the proposed Class and is subject to no unique defenses.

1 33. Plaintiff is similarly situated in interest to all of the members of the proposed
2 Class and is committed to the vigorous prosecution of this action and has retained competent
3 counsel experienced in the prosecution of class actions. Accordingly, Plaintiff is an adequate
4 representative of the proposed Class and will fairly and adequately protect the interests of the
5 Class.

6 34. Plaintiff explicitly reserves the right to add additional class representatives,
7 provided that Defendants are given an opportunity to conduct discovery on the chosen
8 representative(s). Plaintiff will identify and propose class representatives with the filing of
9 Plaintiff's motion for class certification.

10 35. This suit also may be maintained as a class action under Fed. R. Civ. Pro. 23(b)(2)
11 because Defendants have acted, and/or have refused to act, on grounds generally applicable to
12 the Class, thereby making appropriate final injunctive relief. Specifically, injunctive relief is
13 necessary and appropriate to require Defendants to: discontinue sending unsolicited and
14 unauthorized spam text messages to the public.

15 36. **Superiority:** In addition, this suit may be maintained as a class action under Fed.
16 R. Civ. Pro. 23(b)(3) because a class action is superior to all other available methods for the fair
17 and efficient adjudication of this controversy, since joinder of all members is impracticable. The
18 claims asserted herein are applicable to all customers throughout the United States who
19 received an unsolicited spam text message from Defendants. The injury suffered by each
20 individual class member is relatively small in comparison to the burden and expense of
21 individual prosecution of the complex and extensive litigation necessitated by Defendants'
22 conduct. It would be virtually impossible for members of the Class individually to redress
23 effectively the wrongs done to them. Even if the members of the Class could afford such
24 litigation, the court system could not. Individualized litigation presents a potential for
25 inconsistent or contradictory judgments. Individualized litigation increases the delay and
26 expense to all parties, and to the court system, presented by the complex legal and factual issues
27 of the case. By contrast, the class action device presents far fewer management difficulties, and
28 provides the benefits of single adjudication, economy of scale, and comprehensive supervision

1 by a single court.

2 37. Adequate notice can be given to Class members directly using information
3 maintained in Defendants' records or through notice by publication.

4 38. Unless a class is certified, Defendants will continue to use illegal advertising
5 methods to contact the public which in return costs money to innocent recipients of their
6 advertisements. Unless a classwide injunction is issued, Defendants will continue to commit
7 the violations alleged, and the members of the public will continue to be misled.

8
9 **FIRST CAUSE OF ACTION**

10 **Negligent Violation of the Telephone Consumer Protection Act 47 U.S.C. §227**
(Alleged as to all Defendants)

11 39. Plaintiff incorporates by reference all of the above paragraphs of this Complain as
12 though fully stated herein.

13 40. The foregoing acts and omissions of Defendants constitute numerous and multiple
14 violations of the TCPA, including but not limited to each and every one of the above-cited
15 provisions of 47 U.S.C. §227 *et seq.*

16 41. As a result of Defendants' negligent violations of 47 U.S.C. §227, *et seq.*, Plaintiff
17 and the Classes are entitled to an award of at least \$500.00 in statutory damages, for each and
18 every violation, pursuant to 47 U.S.C. §227(b)(3)(B).

19 42. Plaintiff and the Classes are also entitled to and seek injunctive relief prohibiting
20 such conduct in the future.

21 **SECOND CAUSE OF ACTION**

22 **Knowing and/or Willful Violation of the**
23 **Telephone Consumer Protection Act 47 U.S.C. §227**
(Alleged as to all Defendants)

24 43. Plaintiff incorporates by reference all of the above paragraphs of this Complain as
25 though fully stated herein.

26 44. The foregoing acts and omissions of Defendants constitute numerous and multiple
27 knowing and/or willful violations of the TCPA, including but not limited to each and every one
28 of the above-cited provisions of 47 U.S.C. §227, *et seq.*

45. As a result of Defendants' knowing and/or willful violations of 47 U.S.C. §227, *et seq.*, Plaintiff and the Classes are entitled to treble damages, as provided by statute, up to \$1,500.00 for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(c).

46. Plaintiff and the Classes are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and the Class Members the following relief against Defendant:

1. As a result of Defendant's negligent violations of 47 U.S.C. §227(b)(1), Plaintiff seeks for himself and each class member \$500.00 in statutory damages for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B).

2. As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(b)(1), Plaintiff seeks for himself and each Class member treble damages, as provided by statute, up to \$1,500.00 for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).

3. Pursuant to 47 U.S.C. §227(b)(3)(A), injunctive relief as necessary.

4. Any other relief the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury as to all issues so triable.

Dated: June 7, 2011

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